



The Comptroller General
of the United States

Washington, D.C. 20548

A. Beneyam

Decision

Matter of: Michael D. Harley, et al. -- Claims for Environmental Differential Pay

File: B-235461

Date: December 19, 1989

DIGEST

1. We sustain the agency's determination not to authorize environmental differential pay for future exposure to asbestos. The union has not demonstrated by clear and convincing evidence that the agency was arbitrary or capricious in determining that safety equipment and procedures eliminate any hazardous conditions.
2. Claims for retroactive environmental differential pay for prior exposure to asbestos are being reviewed by the agency and will not be considered by our Office at this time.

DECISION

Mr. James M. Peirce, President, National Federation of Federal Employees (NFFE), requests a decision on behalf of 11 employees of the Department of the Army who claim entitlement to environmental differential pay for exposure to asbestos.^{1/} We sustain the agency's decision not to authorize environmental differential pay for future exposure to asbestos. Entitlement to hazardous duty differential is a decision vested primarily in the employing agency, and the union has not provided clear and convincing evidence that the agency acted in an arbitrary or capricious manner in denying environmental differential pay. Claims for prior

^{1/} The employees are Michael D. Harley, Eddie West, Buddy D. Pendley, Jack Hutchinson, Barbara C. Hausam, Clarence Woods, Simy White, Phillip Copeland, Cletus Crosby, Marvin Garrison, and Earl Wahl. In the absence of a duly executed power of attorney or other documentary evidence supporting the representative's right to act for Mr. Wahl, we will not decide Mr. Wahl's claim. See 4 C.F.R. §§ 22.3(e), 31.3 (1989).

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exposure to asbestos are currently being reviewed by the agency and are not the subject of this decision.

BACKGROUND

The claimants are employees of the Department of the Army, Reserves Command, Area Maintenance Support Activity, in Oklahoma City and Broken Arrow, Oklahoma. Their position descriptions indicate that they work with various automotive, heavy mobile and powered support equipment. The employees contend that while working with brakes, clutches, and air conditioning and exhaust systems during the past 6 years, they have been exposed to an undetermined concentration of asbestos and other hazardous fibrous materials which subjected them to potential illness or injury. The employees assert that they are entitled to receive 8 percent environmental differential pay for the period 1983 to 1989.

OPINION

We have consistently held that the authority to determine whether a particular situation warrants payment of hazardous duty differential is a decision which is vested primarily in the employing agency. Joseph M. Braitsch, B-202540, May 11, 1981; Cecil C. Frederici, B-197142, Feb. 12, 1980. We will not substitute our judgment for that of the agency officials who are in a better position to investigate and resolve the matter, unless there is clear and convincing evidence that the agency's decision was wrong or that it was arbitrary and capricious. 58 Comp. Gen. 331 (1979); Joseph Contarino, et al., B-202182, Jan. 19, 1982.

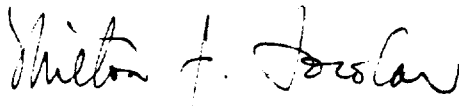
The record shows that the Army conducted a study to determine whether these employees were exposed to such hazardous levels of asbestos concentration so as to warrant environmental differential pay. The study revealed that the employees were using safety equipment and procedures which practically eliminated the hazardous conditions. Based on the results of the study, the agency determined that, as of December 1988, environmental differential pay would not be authorized for continued exposure to asbestos.

The union has not presented any evidence to show that the agency acted unreasonably in refusing to authorize environmental differential pay based on the results of the study. While the Department of the Army is exempted from the Occupational Safety and Health Administration standards under 29 U.S.C. § 652(5), the union has not demonstrated that in conducting the study, the agency did not follow its

own corresponding occupational safety and health standards established under 29 U.S.C. § 668(a).

Accordingly, on the record before us, we cannot say that the agency was either wrong or acted arbitrarily or capriciously in refusing to authorize environmental differential pay based on the conclusions reached in the agency's asbestos exposure study.

Finally, we have been informally advised that the Army is reviewing claims for retroactive environmental differential pay for exposure to asbestos prior to December 1988. Since the agency is considering these claims, they will not be decided in this opinion.

for 
Comptroller General
of the United States